MOTION FILED
JUN 29 1988

No. 87-5840

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD MCNAMARA,

Appellant,

—v.—

COUNTY OF SAN DIEGO
DEPARTMENT OF SOCIAL SERVICES,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF SAN DIEGO AND IMPERIAL COUNTIES IN SUPPORT OF APPELLANT

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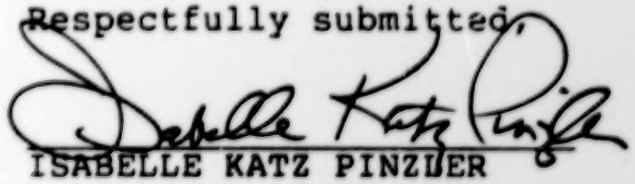
MOTION OF THE AMERICAN CIVIL LIBERTIES UNION, AND ACLU OF SAN DIEGO AND IMPERIAL COUNTIES FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Civil Liberties Union and the ACLU of San Diego and Imperial Counties, hereby move for leave to file the attached brief amicus curiae pursuant to Rule 36.3 of the Rules of this Court. Appellant has consented to the filing of this brief. Counsel for Appellee, however, has been unwilling either to consent to the filing of this brief or to refuse to consent.

This case involves an important and unsettled question of whether a state may terminate the parental rights of an unwed father who has consistently shown an interest in his child under a legal standard that would not be applied to an unwed mother in similar circumstances. Amicus believes that like all gender based distinctions, the one at issue here ultimately harms women, that it

violates the Equal Protection Clause of the Fourteenth Amendment, and that the lower court decision terminating completely appellant's parental rights was erroneous. Accordingly, amicus respectfully moves for leave to file the attached brief amicus curiae in order to present the Court with our views on this important case.

Respectfully submitted,



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INTEREST OF AMICUS

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender based discrimination. It has participated, both directly and as amicus curiae, in the litigation of many cases before this Court and lower courts challenging sex discriminatory practices. The ACLU of San Diego and Imperial Counties is one of the ACLU's local affiliates.

As framed by the parties, the issue in this case is whether the State of California may terminate the rights of an unwed father who has consistently shown an interest in his

child under a legal standard that would not be applied to an unwed mother in similar circumstances. Because the ACLU believes that such gender-based tests violate the Fourteenth Amendment regardless of which gender they apparently disfavor, we respectfully submit this brief as amicus curiae.

Introductory Statement

By all accounts, appellant, Edward, is eager to assume parental responsibilities and would be a willing and competent father. Nevertheless, for the last eight years he has been denied the opportunity to establish a relationship with his daughter, Katie, based on an improper termination of his parental rights shortly after his daughter's birth.

Appellant's relationship with Katie's mother lasted for several months during the

fall of 1980. When the relationship ended in November, neither of them knew she was pregnant. Katie was born on July 18, 1981. While in the hospital, the mother requested adoption assistance, met with a social worker, and placed the child in a foster home three days later. She had never informed Edward of the pregnancy and did not tell him of Katie's birth until August 1, 1981.

Edward immediately contacted the San Diego Department of Social Welfare to determine his rights. He met with a social worker on August 5 and requested that his daughter be placed with the family who was then providing day care for his sons. Later that day, the mother formally relinquished Katie for adoption and rejected Edward's placement request, stating she wished the child placed with a family neither of them knew.

On August 10, a petition to terminate

Edward's parental rights was filed pursuant to California Civil Code §7017.[1/] That same day Edward again met with the social worker,

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[1/] Former California Civil Code, §7017, subdivision (d) (2), in effect at that time, provided in pertinent part:

> "If ... the natural father is identified to the satisfaction of the court ... (he) shall be given notice of the proceeding in accordance with subdivision (f), ... If the natural father or a man representing himself to be the natural father, claims custodial rights, the court shall proceed to determine parental and custodial rights in whatever order it deems proper. If the court finds the man representing himself to be the natural father is a presumed father under subdivision (a) of Section 7004, then the court shall issue an order providing that the father's consent shall be required for an adoption of the child. In all other cases, the court shall issue an order providing that only the mother's consent shall be required for the adoption of the child." (Emphasis added.)

California Civil Code §7004(a) provides that a man may be a "presumed father" either pursuant to §621 of the Evidence Code (i.e., that he is the legal husband of the mother and is not impotent or sterile) or if 1) he and the mother are or were married at the relevant time, 2) he and the mother attempted marriage before the birth, even if the marriage was or could be invalidated, 3) he and the mother married or attempted marriage after the birth and he was named on the birth certificate (with his consent) or he had voluntarily promised in writing to support the child, or 4) he received the child into his home and held the child out to be his natural child.

discovered the mother had relinquished the child for adoption, and expressed his fear that he would be unable to see his child. He arranged to visit the child at the agency offices on August 17, at which time he specifically requested custody for himself. Despite Edward's wishes, Katie was placed with prospective adoptive parents on August 24.

Appellant's termination hearing was not held until December, 1981, at which time the court found him to be the biological father and "a good parent [who] can provide a good, loving home for this child." See, In Re Baby Girl M., 37 Cal. 3d. 65, 68 (1984). At the same time, the court determined it was in the child's best interests to remain with the adoptive parents and, on that basis, terminated Edward's parental rights. Id.

Following a protracted appellate process, this termination decision was

ultimately upheld on a new ground -- that Katie's removal from her adoptive parents, by now the only family she had ever known, would be detrimental to her. In Re Baby Girl M., 191 Cal. App.3d. 786 (1987), (Order of Court of Appeal.) Thus, the State first improperly interfered with appellant and Katie's parent-child relationship early in her life, and then relied on the delays coincident with Edward's lawful attempts to remedy the situation to estrange him further.

Moreover, even the "detriment" standard ultimately applied in this case placed appellant at a significant disadvantage under California law. By contrast, a mother's parental rights can only be terminated in California based on a showing of unfitness, inter alia, due to abandonment, neglect or cruelty, habitual drug or alcohol use, conviction of a felony, physical or developmental disability, etc., pursuant to

California Civil Code §232, or if she consents, pursuant to California Civil Code §224.

Because appellant (like the mother in the Biblical custody dispute resolved by King Solomon) recognizes that a grant of custody to him at this time might indeed be found to be detrimental to his daughter, he seeks only to prevent a total severance of his parent-child relationship with Katie; he seeks the right to visit her and to develop the kind of relationship enjoyed by many thousands of non-custodial parents and their children, a relationship often sought by adopted children with their biological parents.[2/]

[2/] See, e.g., J. B. Triseliotis, In Search of Origins: The Experiences of Adopted People (1973); Sorosky, Baran, & Pannor, "The Reunion of Adoptees and Birth Relatives," 3 Journal of Youth & Adolescence 195 (1974).

SUMMARY OF ARGUMENT

Given the nature of appellant's request for relief, it is important to define with care the issues that are and are not before the Court. The present controversy is over termination, not custody. Moreover, this Court need not become enmeshed in the state law distinction between "best interests" and "detriment" as a standard for determining the parental rights of unwed fathers.[3/] Rather,

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3/ California Civil Code §7017 (d) (2) now reads in relevant part:

> "If the natural father or a man representing himself to be the natural father claims parental rights, the court shall determine if he is the father. The court shall then determine if it is in the best interest of the child that the father retain his parental rights, or that an adoption of the child be allowed to proceed. The court, in making that determination, may consider all relevant evidence, ... If the court finds that it is in the best interest of the child that the father should be allowed to retain his parental rights, it shall order that his consent is necessary for an adoption. If the court finds that the man claiming parental rights is not the father, or that if he is the father it is in the child's best interest that an adoption be allowed to proceed, it shall order that the person's consent is not required for an adoption; such a

(footnote cont'd)

the relevant question facing this Court is the same question faced by the original Family Court judge in 1981 when Katie was only five months old: can a competent and willing unwed father's parental rights constitutionally be terminated, without his consent, under a "best interest" (or "detriment") test that would not be applied to a mother in a similar situation.

This Court has never ruled on the precise standards necessary to extinguish a parent-child relationship so that a child may be adopted by strangers. It has emphasized, however, the constitutional significance of the parent-child relationship, see, e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); Smith v. Organization of Foster Families, 431 U.S. 816 (1977), while at the same time

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> finding terminates all parental rights and responsibilities with respect to the child." (Emphasis added.)

recognizing the importance of non-traditional family relationships, Moore v. East Cleveland, 431 U.S. 494 (1972), and recognizing the often damaging consequences of long term state foster care custody to children, Smith v. Organization of Foster Families, 431 U.S. at 836-37.

In evaluating this case it is significant to note that the mother has voluntarily relinquished her rights. Compare Lehr v. Robertson, 463 U.S. 248 (1983). Appellant was, therefore, the only biological parent left on the scene. The decision to terminate his parental rights based on a legal standard that only applies to unwed fathers cannot be sustained under the Equal Protection Clause.

ARGUMENT

I. CALIFORNIA CIVIL CODE SECTION 7017(d) DISCRIMINATES ON THE BASIS OF GENDER

In a sense, this case picks up where Caban v. Mohammed, 441 U.S. 380 (1979), and Lehr v. Robertson, 463 U.S. 248 (1983), left off, and it compels answers to many of the questions left open by those cases. We deal here, in effect, with a termination of parental rights in infancy. On the one hand, the California courts cut off Edward's parental rights and obligations before he had an opportunity to live with the child, support her financially, or establish any sort of relationship with her. He was thus deprived of the opportunity to take those steps, which are effectively required under Caban and Lehr, in order to stand on an equal legal footing with the birth mother. Instead, he has taken the only path open to him to establish this relationship -

continued litigation and appeals.

Unlike the fathers in Caban and Lehr, however, he does not seek to limit the rights of Katie's natural mother, who consented to the adoption and surrendered all rights years ago. Thus, this is not a case where a mother of a non-marital child seeks to sever the child's legal ties to the father in order to facilitate adoption by her husband;[4/] it is not even a custody dispute between two unmarried parents. Rather, appellant contests the right of the State to sever his parent-child relationship on grounds which patently discriminate on the basis of sex.

Absent a higher substantive showing than was made against appellant here, California's law prohibits terminating the parental rights

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4/ Compare Lehr v. Robertson 463 U.S. at 262 n.19; and Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never lived before.")

of an unmarried mother unless the mother expressly so consents. Yet, in this case, California has terminated the parental rights of an unmarried but acknowledged father despite a specific finding of fitness and in the face of his manifest and persistent refusal to consent.

Amicus recognizes that, under California law, some classes of fathers are treated equally with some classes of mothers on the issue of termination. For example, the termination standard that applies to mothers also applies to married fathers, fathers who attempt marriage, and fathers, even if not married, who take the child in question into their homes and openly hold the child out to be their natural child. See California Civil Code §7004 (a).

Fathers like appellant, however, have been granted a significantly diminished status under California law. Unmarried

mothers who, for whatever reason, do not take their child into their home, are nonetheless legal mothers of those children, and their parental rights cannot be severed absent their consent or a showing of unfitness or abandonment, supra p.6-7. By contrast, appellant's parental rights were first terminated on a "best interests" standard and then on a "detriment" standard. No one contends that either of these standards is equivalent to the standard that would be applied to a mother in equivalent circumstances. There is thus a clear gender based distinction in this class of cases, depriving only men of their parental rights and depriving their children of a legal relationship with their biological fathers.

This Court has repeatedly reaffirmed that such gender-based statutory distinctions must meet "the burden of showing an exceedingly persuasive justification for the

classification....," Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982), quoting Kirchberg v. Feenstra, 450 U.S. 455, 461 (1981). State action that explicitly allocates benefits and burdens on the basis of sex

> must serve important governmental objectives and must be substantially related to the achievement of those objectives in order to withstand judicial scrutiny under the Equal Protection Clause.

Caban v. Mohammed, 441 U.S. at 388 (1979), citing Craig v. Boren, 429 U.S. 190, 197 (1976). The only question in this case is whether California Civil Code §7017(d) meets this test.

II. THE GENDER BASED DISTINCTION IN CALIFORNIA LAW IS NOT CLOSELY AND SUBSTANTIALLY RELATED TO AN IMPORTANT GOVERNMENTAL PURPOSE

To the extent that the State articulates an important governmental purpose in this case, it is to prevent "detriment," i.e.

psychological harm to the child by removing her from the only family she has ever known. Yet, as previously noted, the question of custody is not involved in this case in its present posture. See p.7, supra.[5/]

By relying on "detriment" to terminate appellant's rights, the State has boot-strapped an injury that it caused itself, first by preventing appellant from taking custody of his child and then in prolonging the legal process to the point where removal

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5/ Everyone, including appellant himself, recognizes that custody may be denied to a parent even in favor of a non-parent under California Civil Code §4600, subdivisions (a) and (c) which provide in pertinent part "In any proceeding where there is at issue the custody of a minor child, the court may, ... make such order for the custody of the child during minority as may seem necessary or proper [¶] Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interests of the child..." (Emphasis added.)

of the child would be harmful to her.[6/]

Were this simply a dispute between appellant and the State, it would be easy to say that the State's initial misconduct should not and could not be used against appellant in determining the scope of his present rights. Because the rights of a child are also involved, the calculus becomes more complicated.[7/] But whatever standard

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6/ In other contexts, this Court has appropriately recognized the importance of prompt adjudication in order to prevent the evaporation or transformation of important constitutional rights mainly through the passage of time. See Freedman v. Maryland, 380 U.S. 51, 54-55, 59 (1965); Lakewood v. Plain Dealer Publishing Co., ___ U.S. ___ No. 86-1042 (June 17, 1988), slip op. at 19. If nothing else, this case demonstrates the need for similar due process quidelines when the State moves to terminate parental rights.

7/ For precisely this reason, children should be entitled to appointed counsel in any custody hearing. It is unrealistic to assume that the child's interests are congruent with either parent or parents or the State. Yet, in many ways, it is the child who has the most at stake. In this case, Katie was apparently unrepresented throughout these proceedings. One function that counsel for the child might have performed is to insist on expeditious decisionmaking. See n.6, supra.

California uses in terminating the parental rights of an unwed parent, it must be the same for both parents.[8/] The standard applied to mothers is plain: desertion, relinquishment, or, in certain cases, failure to pay for care, support, and education. Civil Code §232. Fathers are entitled to be judged by the same rule.

A. This Gender Based Distinction Is Not Supported By a State Interest In Encouraging Adoption Of Non-Marital Children

The State has an interest in encouraging the incorporation of non-marital children into adoptive new homes in order to ensure

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8/ Because of the gender discrimination inherent in California's statutory scheme, this case does not require the Court to determine the constitutional limits of a gender-neutral termination standard. Any such standard must, in our view, take into account the child's interest in a permanent and stable home. On the particular facts of this case, however, that interest is unlikely to be disturbed regardless how the termination question is resolved.

stability and to remove the stigma of illegitimacy.[9/] "But the unquestioned right of the State to further these desirable ends is not in itself sufficient to justify [a] gender-based distinction." Caban, 441 U.S. at 391. Moreover, any distinctions must be reasonably structured to further the State's ends. Id. The Caban Court, while explicitly reserving the question of newborn adoptions, 441 U.S. at 392 n.11, identified two areas of inquiry to determine whether a statutory scheme is reasonably structured to further the goal of adoption without trammeling on parental rights: 1) Is this man the biological father of this child?, and 2) has

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9/ Amicus believes that children have a substantive due process right to a stable home, which is violated by the all-too-frequent phenomenon of indefinite foster care. On the facts of this case, however, it is reasonable to assume that Katie will either remain with the family that has raised her since birth or be returned to her father at some point in the future if circumstances change dramatically. In either case, the difficulties posed by prolonged state custody are substantially diminished here.

he abandoned this child?

As a result of dramatic advances in blood typing, the first question need not detain the Court long. Paternity can now be established with a high degree of certainty. See, Clerk v. Jeter, ___ U.S. ___, 56 USLW 4527 (June 6, 1988).[10/]

Abandonment, or the lack thereof, may prove more subtle and ambiguous, and depends on whether the father has done all that he reasonably could be expected to do, under the facts of the case, to establish and protect a relationship with the child. In some cases, during the pregnancy the father will have offered marriage, financial support, a home for the child, etc., all or some of which the mother may have refused. In the instant

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10/ Indeed in an era of in vitro fertilization and embryo transfer, it may prove difficult to identify a child's "mother" where the egg can be donated by one woman (the genetic mother) and the fetus carried to term by another (the gestational mother).

case, appellant's relationship with Katie's mother was apparently casual and of short duration;[11/] she did not inform him of the pregnancy, and he did not even know of the existence of the child until after she was born.[12/]

Distinctions, of course, are not made between classes of fathers - married, unmarried, type or duration of the relationship with the mother, behavior toward children, etc. when it comes to the obligations of parenthood, such as child support - and rightly so. Such facts cannot, with justice, be held against this father when it comes to the rights of parenthood. Once he knew of Katie's birth, he acted quickly to

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11/ There is no question, however, that he is the father.

12/ This case does not present and, therefore, the Court need not address, the question of the father who is never informed that he has a child, but discovers the fact years later.

establish a relationship with her. It is difficult to imagine what more he could have done. It is the State which acted unconscionably in delaying and prolonging the legal proceedings. Under these circumstances, appellant cannot be said to have abandoned Katie. On the contrary, he has manifested a significant parental interest, and has persistently sought to establish and maintain a relationship with her.

B. This Gender Based Distinction Cannot Be Supported by Any Inherent or Profound Difference Between Mothers and Fathers.

As this Court has noted:

> Natural parental interest [may be] shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers and fathers for their children.

Caban, 441 U.S. at 391-92.

There is only one respect in which the interests of mothers and fathers are

profoundly and inherently different, and that issue is not presented here. That one area involves the fundamental right of a woman, in consultation with her physician, to terminate a pregnancy. Roe v. Wade, 410 U.S. 113 (1973). Because the State may not constitutionally interfere with a woman in the exercise of that fundamental right of privacy, this Court has held that the State may not delegate such authority to the woman's husband, Planned Parenthood v. Danforth, 428 U.S. 52 (1976), or necessarily by implication to the "father" of a fetus she is carrying.[13/]

Once the child is born, however, no reason exists, outside of social custom and stereotyped notions of the proper roles for

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[13/] This may at first blush appear to create an inequality in parental rights between mothers and fathers. In fact, it does not. Rather, the Danforth rule creates an equality of rights between men and women to privacy and bodily integrity.

women and men, to support a gender based distinction in parental rights and obligations. It does not serve the needs of women, men, or - most importantly of children - to presume that either gender has a monopoly on nurturance, love, concern, or the willingness to support and care for children. An official presumption that unwed fathers are uninterested, however, can surely help to create or perpetuate such a result. Indeed, the traditional exclusion of fathers from full parental rights has been said to contribute to the anger and resentment of some fathers and to lead, however unjustifiably, to an unwillingness to participate in childrearing when offered the opportunity and to a high rate of deliquency in payment of child support even when court ordered. The latest Census Bureau statistics, for the year 1985, reveal that almost 9 million mothers were heads of

households with children. Only 61 percent of those women had court awards or agreements to receive child support. Of these women, only 48 percent received full payment, 27 percent received partial payment, and 26 percent received no payment. U.S. Bureau of the Census, Current Population Reports, Series P-23, No. 152, Child Support and Alimony: 1985 (Advance Data From March-April 1986 Current Population Surveys), U.S. Government Printing Office, Washington, D.C., 1987.

A holding by this Court that unwed fathers do not share equal rights as well as equal responsibilities for their children will send precisely the wrong message to these fathers and may further trap the mothers of these children and the children themselves in the cycles of poverty and dependence in which they all too often find themselves.

CONCLUSION

For the foregoing reasons, this case should be reversed.

Respectfully submitted,

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